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SUPREME COURT

OCTOBER TERM, 1947

No. 283

GEORGE GRAFF, Petitioner,

vs.

H. SAM PRIEST, as President of the Board of Police Commissioners of the City of St. Louis, Respondents.

RESPONDENTS' SUGGESTIONS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 253.

GEORGE GRAFF, Petitioner,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 253.

GEORGE GRAFF, Petitioner,

vs.

H. SAM PRIEST, as President of the Board of Police Commissioners of the City of St. Louis, Missouri, et al., Respondents.

RESPONDENTS' SUGGESTIONS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondents herein deny that your petitioner, George Graff, has been aggrieved by the judgment of the Supreme Court of the State of Missouri, entered in the cause styled "George Graff, Respondent, v. H. Sam Priest, as President of the Board of Police Commissioners of the City of St. Louis, Missouri, et al., Appellants," being cause No. 40171 on the docket of said Supreme Court of the State of Missouri, and reported as Graff v. Priest et al., 201 S. W. 2d 945, not yet offically reported in the Missouri Reports. Said Supreme Court of Missouri reversed the judgment of the trial

court, and on the 12th day of May, 1947, denied said petitioner, George Graff, his motion for a rehearing of said cause, or, in the alternative, to transfer said cause to said Supreme Court of the State of Missouri *en banc*, but said Supreme Court of the State of Missouri did enter final judgment reversing the judgment of the trial court.

Your respondents further deny that the matters of issue in said cause are of a Federal nature and are of peculiar gravity and importance, but assert that said issues are purely within the power and province of the State of Missouri, and in no way do the determinations aforesaid made affect any right guaranteed under the Constitution of the United States. That the respondents further declare that the only issue in said cause was a determination of the constitutional validity of an Act of the 63rd General Assembly of the State of Missouri (now published in Laws of Missouri, 1945, pp. 1032-1035, and set out in full in the appendix to Petition, pp. 31-35). The constitutionality of said act was upheld in the opinion of the Supreme Court of the State of Missouri, as set out in full in the petitioner's Transcript of the Record, pp. 54-64. Therein, the Supreme Court of the State of Missouri declared that said act was not violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States citing the applicable decisions of this Honorable Court upon the question involved and the principles announced by this Court in said decisions.

The duly certified record, including all the proceedings in the Circuit Court of the City of St. Louis, State of Missouri, wherein said cause was instituted, and in the Supreme Court of the State of Missouri, to which an appeal was taken by said H. Sam Priest, as President of the Board of Police Commissioners of the City of St. Louis, Missouri,

et al., from the judgment of the trial court, was herewith filed under separate cover, in petitioner's Transcript of the Record.

Wherefore your respondents deny that said petitioner was in any way aggrieved on any issues before the Supreme Court of the State of Missouri or by any of its acts or decisions.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The petitioner in this case conducted a Night Club and Restaurant, open to the public, in which he sold food and non-alcoholic beverages to his customers and provided music, entertainment and shows, the floor shows being given at 11:00 o'clock P. M., 1:00 o'clock A. M. and 3:00 o'clock A. M. on each night. Petitioner did not possess a license under the Liquor Control Act of the State of Missouri (R. 19) for the sale of intoxicating liquor. Under the Liquor Control Act of Missouri persons licensed to sell intoxicating beverage by the drink for consumption on the premises are required to close their establishments at 1:30 o'clock A. M. on week nights and at 12:00 o'clock P. M. on Saturday night. The petitioner, prior to the enactment of the statute in question, not being required to have a license under the Liquor Control Act because he did not sell alcoholic beverages, was not required to observe the closing hours provided under the Liquor Control Act. Approximately half of the petitioner's customers, however, brought their own intoxicating liquor with them and engaged in the drinking and consumption of intoxicating liquor on his premises, with his permission, during all hours of the night, until his establishment closed approximately at 4:00 o'clock A. M. (R. 2, 38.)

The Act of the 63rd General Assembly of the State of Missouri, approved January 18, 1946, which is challenged by the petitioner, required any person operating any premises where food, beverages or entertainment are sold or provided for compensation, who permitted the drinking or consumption of intoxicating liquor in or about said premises after 10:00 o'clock P. M., to secure a license from the Supervisor of Liquor Control at the cost of $60.00 per year. The law further provides,

> "The drinking or consumption of intoxicating liq rs shall not be permitted in, on or about the licensed premises * * by any * * person between the hours of 1:30 A. M. and 6:00 A. M. on any week day and between the hours of 12:00 o'clock midnight Saturday and 12:00 o'clock midnight Sunday," and on certain other days."

The Act further provides that the provision regulating the drinking or consumption of intoxicating liquors between certain hours and on certain days shall also apply to premises licensed under the Liquor Control Act to sell intoxicating liquor by the drink. The law was enacted as an amendment to the Liquor Control Act of the State of Missouri.

The petitioner testified that the effect of not permitting the consumption of intoxicating liquor on his premises between the hours of 10:00 P. M. and 6:00 A. M., or between the hours of 1:30 A. M. and 6:00 A. M., would greatly lessen his patronage (R. p. 26).

The petitioner accurately states the facts involved and the procedure of the State courts on pages 3-8 of said petition. The same is hereby adopted as an acurate resume by respondents herein.

OPINIONS OF THE COURTS BELOW.

There was no "opinion" of the trial court. The decree entered by the trial court appears at pages 37-50, inclusive, of the printed transcript of record herein filed, but said decree is not otherwise reported.

The opinion of the Supreme Court of the State of Missouri appears at pages 54-64, inclusive, of the printed transcript of record herein filed. It is reported as Graff v. Priest et al., 201 S. W. 2d 945, but is not yet officially reported in the Missouri reports.

JURISDICTION OF THIS COURT.

The jurisdictional statement of the petitioner is adopted by the respondents herein.

QUESTIONS PRESENTED.

I.

The questions to be raised and presented in this Court upon the record are, substantially:

A. Whether the Act of the Missouri Legislature here in question, in making it a criminal offense for one person to permit another to perform an act, namely; drink or consume intoxicating liquors, the doing of which by the latter is entirely lawful and innocent, deprives the former of due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

B. Whether such Act, in making it a criminal offense for one person to permit another to drink or consume intoxicating liquors "in, on or *about*" the premises of the former, is so vague, indefinite and uncertain as to deprive the former of due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

SUPPORTING BRIEF.

I.

The Act of the 63rd General Assembly of Missouri here in question does not violate the natural rights and securities of petitioner, and does not deprive petitioner of his liberty and property, without due process of law, and in no way can be considered as in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

II.

The Supreme Court of the State of Missouri did rule that: (a) That the act in question, Section 4895a, Laws of Missouri, 1945, does not violate the Federal guarantee of due process of law. (b) That the act in question, Section 4895a, Laws of Missouri, 1945, does regulate the consumption of intoxicants and does set up and establish definite standards of conduct, so that ordinary men would not differ as to the meaning of said section.

III.

The prohibition and/or regulation of intoxicants is a matter within the power of the State.

IV.

All the regulations and/or prohibitions relating to intoxicants grow out of the police power of the State.

V.

The State having the power to prohibit intoxicants by an exercise of its police power, it has the lesser power to appropriately regulate intoxicants in any manner which is to the general good of its citizenry.

VI.

The present statute, Section 4895a, Laws of 1945, supra, is a reasonable regulation of intoxicants.

ARGUMENT.

It is encumbent upon the petitioner to establish that the State Court has decided a federal question of substance not heretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.

It is the contention of the petitioner that the State Court has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court (p. 10, petition for writ of certiorari).

The petitioner has cited a number of cases which hold that a State may not deprive a citizen of his liberty, which liberty includes the right to engage in certain lawful and innocent activities, such as the right to engage in the common occupation of life, which we assume would cover the right to sell food, beverages and entertainment in the operation of a night club. It does not follow, however, that the State has no power to prohibit the operation of such an establishment which not only permits the drinking of alcoholic beverages as an adjunct of its business, but where its very success is dependent upon this propensity of its customers. While it may be that the right to engage in the petitioner's occupation may be a liberty protected by the Constitution, it does not follow that the State cannot regulate such a business to the extent of prohibiting the permissive consumption of alcoholic beverages by customers during certain hours of the late night and early morning.

The petitioner has cited no cases at all in point. His authorities are limited to those that hold generally that a

State cannot declare unlawful the innocent exercise of the right to engage in a common occupation of life, to make proper contracts in reference thereto, and that the State regulation thereof, under the police power, must have a direct relation, as a means to an appropriate end, to public health, morals, welfare or safety. The petitioner cites no cases at all that would indicate that this particular regulation by the State of Missouri is unreasonable, not a proper exercise of the police power, or in any way violative of the 14th Amendment of the Constitution. He relies upon the general principle that the State cannot prohibit an innocent and lawful act, and, therefore, cannot prohibit a proprietor of a public place from permitting his customers to engage in such innocent and lawful acts. Since the act of drinking in a public place is not made unlawful by the State, petitioner contends that it is innocent and lawful. Therefore, it follows from his syllogism that the State cannot prohibit the petitioner from permitting his customers the innocent and lawful act of consuming intoxicating beverages on his premises.

This is purely sophistry. It is glaringly so since the petitioner admits that the State could prohibit entirely the drinking or consumption of intoxicating liquor in public places and semi-public places, such as the place of business of the petitioner (p. 22, petition for writ of certiorari) and admits the right of the petitioner to control the conduct of his customers, even in respect to innocent and lawful acts (p. 21, petition for writ of certiorari).

Since the petitioner's whole case is based upon the contention that one of the liberties of the petitioner, protected by the Constitution, is the right to permit others to perform wholly innocent and legal acts, he admits (by way of deduc-

tion) that the State has the right to prohibit him from permitting persons under his control from performing acts which are not wholly innocent and legal. Therefore, petitioner's whole case turns on the defintion of "wholly innocent and legal acts."

The Federal question, if any such question exists, is one of a general nature, involving the power of a state to effect the interests of an extensive class of persons engaged in the business of selling, or providing for compensation, food, beverages, and entertainment, and permitting the uncontrolled consumption of intoxicants upon premises either owned or operated by them.

I.

a. The petitioner relies heavily upon the contention that Section 4895a, Laws of Missouri, 1945, makes it unlawful for one person to permit another to perform, what the petitioner asserts, is a wholly lawful and innocent act, that is, consume intoxicants. In other words, the statute is defective, so the petitioner contends, because the statute is directed at the operator and not the consumer. The respondents contend that this statute, Section 4895a, Laws of Missouri, 1945, comes within those statutes enacted for the health, safety, peace, comfort, morality and general welfare of the community or the citizenry of the state at large. Uncontrolled and unregulated drinking or consumption of intoxicants can be argued as detrimental per se. One has but to glance at the daily papers to discover constant and numerous items relating to dipsomania, car accidents and all types of injuries that flow directly from the uncontrolled *use* of intoxicants, fights and other distrubances, obscenities and lewdness that follow upon the excessive and unregulated use of intoxicants; all of these things directly result from the

use of intoxicants, and any statute that tends to minimize these harmful results from the use of intoxicants cannot be argued in any other way than being in favor of the general welfare of the citizenry of this state. Therefore, the respondents herein contend that the authorities and quotations to follow clearly show that the state has the right to regulate intoxicants unfettered by the restrictions laid down in the Federal constitution by the requirements of due process, or any of the restraints found in Section 1 of the Fourteenth Amendment to the Federal Constitution. Those restrictions simply do not apply where intoxicants are involved, for the Courts well know the dangers attendant upon the *use* of intoxicants.

The trial Court found that Section 4895a, Laws of Missouri, 1945, is not directed against the person who consumes the intoxicants, but is directed only against the person who *permits* the consumption of intoxicants in places providing food, beverages and entertainment for compensation. The trial Court found that the drinking or consumption of intoxicants was "wholly legal and innocent," and that it was defective for the act, Section 4895a, Laws of Missouri, 1945, to declare criminal the act of one who permits a "wholly legal and innocent" act. The use of the term "legal" by the court can mean nothing other than that the Legislature by enactment made it the privilege of the citizens of the State of Missouri to consume intoxicants. The consumption of intoxicants is not such a "legal" act as is the wearing of clothes, the eating of food or the smoking of tobacco. Those acts certainly are "legal" acts, yet the Legislature could regulate them and has to the extent of prohibiting lewdness, the spread of disease by unclean food, and the smoking of tobacco at certain times and

places. The act of consuming intoxicants is a "legal" act only because the Legislature made it such, and is not such an act that without the condonations of the Legislature it would be considered as such. The lower Court also found that drinking or consuming intoxicants was an "innocent" act. Suffice it to say that there may be explanations for drinking or consuming intoxicants, but no one can come forward with a justification for the use of intoxicants. Nowhere can anyone find any authority that proclaims the use of intoxicants as "innocent." Throughout time the use of intoxicants has been condemned as an act that promotes immorality, disturbances of the peace and destroys the comfort of the community and aids in making derelicts of men. Could the *use* of such an object be considered in any light as "innocent?"

Regarding the statement that this section, Section 4895a, Laws of Missouri, 1945, is not directed at the consumer but at the one who permits the act, we deem it well to point out that the Liquor Control Act of Missouri nowhere makes it a criminal offense for the consumer to do the things that are prohibited and made unlawful by said act. It is no offense for the consumer to purchase intoxicants from a person who does not have a license, but it is a felony under the Missouri law for any person not having a license to sell said intoxicant, see Sections 4895, 4898, and 4900(g) Mo. R. S. A. Other examples appear in various sections of Article 1, Chapter 32 the Liquor Control Act of Missouri, which demonstrate the fact that the Legislature has consistently throughout the act levelled the penalties at the operators, not at the consumers. That is where the control is sought to be placed. There can be a great degree of control exercised over a limited number of licensees under

the supervision of the Department of Liquor Control of the State of Missouri, those engaged in dispensing and selling intoxicants, but it would be impossible to control the actions of everyone that purchased an intoxicant and the resulting use of said intoxicant. The Legislature, therefore, has wisely placed the burden upon the licensees or operators of businesses which are in juxtaposition to intoxicants. Cognizant that the control of intoxicants will be best effected by that direction of the statutes, the Legislature has declared that it is not a crime for a minor to purchase intoxicants from anyone licensed or not, but it is a crime for any person licensed or not to sell, give away, or otherwise supply intoxicants or nonintoxicants to a minor. Sections 4885 and 4995a, Mo. R. S. A. It is not a crime for the consumer to purchase intoxicants during certain hours on Sunday or election day, but it is a crime for the licensee to make the sale of the consumer, Section 4891, Mo. R. S. A. There are many instances of this type of legislation in other fields of law, and even in Federal legislation. An outstanding example of this type of legislation is involved in the Act of Congress of June 25, 1910, commonly known as the Mann Act, or White Slave Act (36 Stat. 825). This Act makes it unlawful to transport or aid in transporting any woman in interstate commerce for immoral purposes. But the act of the woman in traveling in interstate commerce for immoral purposes is a wholly innocent and lawful act, in the sense that it is not made an unlawful act by Congress or by the States, which have no power over the act of traveling in interstate commerce. Even the immoral act contemplated on arrival at the destination of the trip may be one not made unlawful by State law, as the Englishman's prerogative is not everywhere made a crime. The Mann Act was, of course, held constitutional.

Therefore, if this statute, Section 4895a, supra, is to be held unconstitutional for the reason that it is not directed at the consumer, but at the person who permits the consumer to do an act, then many of the other provisions of our Liquor Control Act, Article 1, Chapter 32, R. S. Mo., 1939, must be held invalid on the same reasoning and the entire theory of the Liquor Control Act will be defeated. In the Supreme Court of the State of Missouri, the petitioner relied heavily upon the case of State v. Excelsior Springs Light, Power, Heat & Water Co., 212 Mo. 101, 110 S. W. 1079, as declaring void a statute which made it unlawful for another to *permit* someone else to commit a crime. The Supreme Court of Missouri, in its opinion, p. 61, Transcript of the Record, aptly points out why that holding was inapplicable to the present cause. Under the present statute there is a duty imposed upon the operator of a set-up establishment to prohibit the consumption of intoxicants during certain hours, and said duty is laid upon the operator "in, on or about" premises directly under his charge and control. The respondents contend that where by statute a duty has been imposed upon the operators of a class of business and when said duty is to be executed upon premises directly under the operator's control, there is no violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States, when it is declared to be criminal for the operator to permit another on his premises to breach the law. The petitioner has cited no cases whatsoever that even suggest that the State has no power to make it unlawful for the petitioner to permit drinking by persons under his control on his premises, unless it first makes it unlawful for such persons to drink on his premises.

The 21st Amendment returned to the States the exclusive control over the transportation and possession and use of liquor within the States. Viewed in the light of this Amendment to the Constitution, and in the light of the decisions of this Court in Ziffrin, Inc. vs. Reeves, 308 U. S. 132 60 Sup. Ct. 163, 84 Law Ed. 128; the State Board of Equalization, California, vs. Young's Market Co., 299 U. S. 59, 57 Sup. St. 77, 81 Law Ed. 38; Joseph S. Finch & Co. vs. McKittrick, 305 U. S. 395, 59 Sup. Ct. 256, 83 Law Ed. 246, holding powers of the States to control traffic in liquor to be absolute, it would seem tenuous to contend that a substantial Federal question is raised by this petition.

b. Petitioner also submits that the present statute, Section 4895a, Laws of Missouri, 1945, is violative of the due process guarantee by reason of the term "about". This term, petitioner claims, makes the statute so vague, uncertain and ambiguous as to prevent there being a standard of conduct sufficiently certain that reasonable men would not differ as to its meaning. We, the respondents, submit that the Supreme Court of Missouri in its opinion, as printed on page 62, Transcript of the Record, disposed of this contention.

The Act refers to the premises of a proprietor interested in the sale of food, beverages or entertainment. It is designed to regulate the policy of the proprietor of such an establishment in controlling the conduct of his customers with respect to the permission of the consumption of alcoholic beverages. Read as a whole it is perfectly clear that the Act is not designed to control the conduct of persons who are not on the premises, who are not customers of the proprietor, and who are not there in connection with the business operated by the proprietor. If the proprietor should set up tables on the sidewalk in front of his establishment, serve

his customers there, and provide them with food and entertainment, the law would seem to be applicable, even though technically the title to the sidewalk might be in the City. The use of the term "about" is appropriately designed to give an untechnical but common-sense interpretation to the application of the law. Persons not under the control of the proprietor, not his customers, not on his premises, or on places not so intimately connected therewith as to be a part thereof, particularly as operated, would clearly not come within the provisions of the law.

No one would expect a licensee to police the entire community, but only the premises as described in the application for such license itself. There is no vagueness, ambiguousness or uncertainty with respect to the duty which persons operating "set-up" places may have concerning the conduct of others in places other than in or upon the owner's premises. The duty applies only to the licensed premises, that is, those premises under the control of the operator. If the confusion in the mind of the petitioner exists because of the use of the term "about" that has been dealt with by the Supreme Court of Missouri, p. 62, Transcript of the Record. It is apparent that operators of "set-up" places do have control in, on or about the premises and there can be no indefiniteness as to their duty when permitting the consumption of intoxicants on said premises under the provisions of Section 4895a. The findings of the trial court that Section 4895a, lacks the necessary standard of conduct by which those to whom it is applicable can determine its meaning and application, can easily be refuted by the most cursory examination of said section. The meaning of said section is perfectly clear and particularly so as it applies in the instant case when read with the peti-

tioner's own evidence. The evidence showed that the petitioner would have to discontinue the operation of his establishment in the event Section 4895a, was enforced. That clearly demonstrates that the petitioner acknowledges the fact that "set-up" establishments do the major portion of their business within the hours in which section 4895a, prohibits the consumption of intoxicants. That is almost an express admission that the operation of a "set-up" establishment is dependent upon two things: one, permitting the unregulated and uncontrolled consumption of intoxicants, and two, remaining open to the public at hours and times when the ordinary retail liquor-by-the-drink establishments are required to cease their normal business activities. What could be a plainer admission of a recognized standard of conduct than that made by the petitioner in his own testimony. Section 4895a, Laws of Missouri, 1945, means exactly what it so plainly says—that those to whom it is applicable, those who furnish "food, beverages or entertainment for compensation" cannot permit the consumption or drinking of intoxicants on their premises between the hours of 10:00 P. M. and 6:00 A. M. the following day unless they possess a license from the Department of Liquor Control for the State of Missouri, in which event they may permit the consumption or drinking of intoxicants upon their premises from 6:00 A. M. until 1:30 A. M. the following day with the exceptions as stated in said section on Sundays and election days. Section 4895a, actually regulates the consumption or drinking of intoxicants. No better proof of this can be presented that the petitioner's own testimony wherein he stated that if Section 4895a was enforced his business would be a losing venture and that if he was prohibited from permitting patrons to consume or drink intoxicants within the

prohibited hours upon his premises, there would be no reason for said patrons to attend his establishment. The petitioner himself thereby proves that the regulation applies not to the business of providing food, beverages and entertainment, but regulates the major portion of his business, which is the permitting of patrons to engage in the unregulated and uncontrolled consumption of drinking of intoxicants at all hours and times upon his premises. As pointed the providing of food, beverages or entertainment can continue at any hour and on any day that the proprietor of a "set-up" establishment or any other establishment wishes to do so. Only the consumption or drinking of intoxicants, the financial backbone of these "set-up" establishments, is regulated.

c. The respondents have denied that there is a Federal question involved here, and even admitting the existence of the Federal question, the Supreme Court of Missouri has held (see opinion, pp. 54-64, Transcript of the Record) that the act in question and its enforcement in no way violates the Federal Constitution. Furthermore, the statute applies only to operators within the boundaries of the State of Missouri and is a state regulation of the *use* of intoxicants. There can be no doubt as to a state's exclusive right to regulate or control the use of intoxicants. Discussion under points III to VI, following, will clearly sustain this assertion. There can be no argument brought forward that will destroy the power of a state to affect the interests, especially when such interests are of a pecuniary nature, of a single class of persons whose interest or activities are so closely aligned with the use of intoxicants, that a regulation of same will cause the interest to increase or diminish. It is the intoxicant that is subject to regulation and the mere incidental

effect upon another's pecuniary interest by reason of such regulation is not an applicable argument in an attack upon said regulation; L'Hote v. New Orleans, 177 U. S. 587, 20 S. Ct. 788, 44 L. Ed. 899; Erie R. Co. v. Williams, 233 U. S. 685, 34 S. Ct. 761, 58 L. Ed. 1155.

II.

(a). The Supreme Court of Missouri undertook to determine whether or not the Federal guarantee of due process under Section 1, of the Fourteenth Amendment to the Constitution of the United States would be violated by the enactment and enforcement of section 4895A, Laws of Missouri, 1945. The Supreme Court of Missouri lengthily reviewed each decision cited by the petitioner in his brief to that Court and succinctly held, page 61, Transcript of the Record:

> "Neither of the above cases nor any case cited by the plaintiff (petitioner here) supports his contention that the act here in question violates due process, * * * (insert ours)."

Again, the Supreme Court of Missouri, in its opinion, page 62 of the Transcript of the Record, states:

> "We do not think that the act infringes upon plaintiff's (petitioner here) rights under the due process provisions of the state and federal Constitutions or deprives him of equal protection * * * * (insert ours) * * * *."

The Supreme Court pointed out that there was not one case that held what the petitioner contended. There is no case that is directly in point. It is a process of picking the applicable principles and applying them to the facts at hand, which in the instant case are novel. But even under

that reasoning the Supreme Court of Missouri did not find any of the principles announced in any of the cases cited by the petitioner which would apply to the instant case, and necessarily ruled against the petitioner in their opinion.

(b). The Supreme Court of Missouri expressly ruled against the contention of the petitioner that Section 4895a, Laws of Missouri, 1945, regulates not the consumption of intoxicants, but the business of providing food, beverages and entertainment for compensation. The Court at page 62, in its opinion, Transcript of the Record, held:

> "Plaintiff contends that the act "does not regulate the drinking or consumption of alcoholic liquor, but regulates the business of providing food, beverages or entertainment. The section plainly does not regulate the business of providing food, etc., it is only the drinking and consumption of intoxicating liquor that is regulated. * * * *".

The ruling is bottomed upon the plain and express language of the statute and the petitioner's own evidence which discloses beyond a doubt that if the statute is enforced and patrons are denied the right to consume intoxicants, uncontrolled and unregulated, they "just wouldn't come." The most cursory examination of the statute reveals just exactly what the Supreme Court of Missouri held, that the statute does regulate the consumption of intoxicants.

With these rulings of the Supreme Court of the State of Missouri in mind, the respondents believe that the correct attitude, both legally and morally, is found in the following points and the accompanying discussions.

III.

The prohibition and/or regulation of intoxicants is a matter within the power of the State.

There is no question but that the federal authorities admit and condone the power of the states to regulate intoxicants within the states' limits. This restoration of the states' power, in regard to intoxicants, came about through the enactment of the Twenty-first Amendment to the Federal Constitution, which restored to the states full power and jurisdiction over intoxicants, that is, the power to regulate their manufacture, possession, transportation, *use*, etc., unhampered by any of the federal limitations imposed upon Congress by the Constitution of the United States. The Twenty-first Amendment repealed the Eighteenth Amendment to the Constitution of the United States, which originally vested this prohibitory power in the Federal Government. The Twenty-first Amendment in its first sections, reads as follows:

> "Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> "Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The power of a state to regulate intoxicants has been acknowledged by the Supreme Court of the United States in many instances. In the case of Samuels v. McCurdy, 45 S. Ct. 264, l. c. 265, 267 U. S. 188, 69 L. Ed. 568, the United States Supreme Court laid down the following rules in regard to a state's power to regulate intoxicants consistent with the requirements of the Fourteenth Amendment:

> "It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be

consequent upon their use, a state has power absolutely to prohibit manufacture, gift, purchase, sale or transportation of intoxicating liquors within its borders *without violating the guarantees of the Fourteenth Amendment.*" * * * * "The Court pointed out that as the state had the power to prohibit it might adopt such measures as were reasonably appropriate or needful to render exercise of that power effective * * * * that *the right to hold intoxicating liquor for personal use was not one of those fundamental privileges of a citizen of the United States which no state could abridge.*" * * * Nor can legislation of that character come within the Fourteenth Amendment, * * * * "The ultimate legislative object of prohibition is to prevent the drinking of intoxicating liquor by any one because of the demoralizing effect of drunkenness upon society. * * * *" (Italics ours.)

Again in the case of Ziffrin, Inc. v. Reeves, 84 L. Ed. 128, 208 U. S. 132, 60 S. Ct. 163, l. c. 167, 168; the United States Supreme Court held that a state:

"* * * * may protect her people, against evil incident to intoxicants, * * * *" "* * * * in order to minimize well known evils, * * * *"

Another case indicating the extent of the police power of a state, after the adoption of the 21st Amendment, in the exercise of that power over intoxicants and the subjects over which, and the purposes for which the police power of a state may be exercised, is the case of Eberle vs. Michigan, 58 L. Ed. 803, 232 U. S. 700, 34 S. Ct. 464, l. c. 465.

"* * * * Liquor laws are enacted by virtue of the police power to protect the health, morals, and welfare of the public. * * * *"

The respondents believe that the above quoted cases clearly demonstrate that the United States Supreme Court recog-

nizes the power of a state to regulate intoxicants and the extent of said regulations is a matter solely within the power and the discretion of the state. Missouri's view regarding the power of a state in the regulations pertaining to intoxicants may be found in the following cases: Griesedieck Bros. Brewing Co. v. Moore, 262 Fed. 582; General Sales and Liquor Co. v. Becker, 14 F. Supp. 348; State v. Privitt, 39 S. W. (2) 755, 327 Mo. 1194; State v. Kennedy, 123 S. W. (2) 118, 343 Mo. 786; State ex rel. Klein v. Balsiger (Mo. App.), 151 S. W. (2) 521; State v. Parker Distilling Co., 237 Mo. 103, 139 S. W. 453.

Under the authorities, supra, there is no doubt but that a state may regulate intoxicants. That is what Section 4895a, Laws of 1945, does, that is, regulate the consumption of drinking of intoxicants upon particular premises and at particular times.

Therefore, the respondents contend that under the law the present statute is a regulation of the consumption of intoxicants, that it has been established that the state has the power to regulate intoxicants in any manner which will reasonably bring about the protection of her citizenry and minimize the evils attendant upon the use of intoxicants.

IV.

All the Regulations and/or prohibitions relating to intoxicants grow out of the police power of the State.

All statutes regulating the manufacture, sale or *use* of intoxicants are enacted by virtue of the police power of the state. Every statute, state or federal, upon the subject, which has been held constitutional, was sustained upon the ground that it was the proper exercise, by the legislature, of the police power of the state. See the following cases for

affirmance of that statement: Licenses Cases, 12 Law Ed. 314; 8 Cyc. 683; Griesedieck Bros. Brewery Co. v. Moore, 262 F. 582; General Sales and Liquor Co. v. Becker, 14 F. Supp. 348.

Unquestionably, a state may and has regulated intoxicants as to manufacture, possession, importation, transportation, *use*, and so on, and unquestionably a state has the power to regulate premises or places of business where liquor is consumed as to the hours when it may be consumed. The regulation in this instance is only upon the use or consumption of the liquor as to where and when it is consumed.

The reason for this police power is that intoxicants are such subjects as tend to deprave the public morals. In other words, intoxicants have noxious qualities and therefore may be regulated by a state in the interests of the public. Authority holding that this power to regulate comes under the police power generally, is 33 C. J., Sec. 34, Page 505, which provides as follows:

> "Under their inherent police power, * * * * the right to prohibit, regulate, or restrain, * * * * the state had power to enact any and all laws for the suppression of intemperance and the minimizing of the evils resulting from the traffic in intoxicating liquors by totally prohibiting or by restricting and licensing * * * *."

Note particularly that the above quotation speaks of the state's power to enact *any and all* laws for the suppression of intemperance and the minimizing of the evils resulting from the *use* of intoxicants by restricting or prohibiting their use. There is no complete prohibition in Section 4895a, Laws of 1945, merely a reasonable regulation of the consumption of intoxicants at particular premises and at

particular times. Obviously, under the authorities and cases cited and quoted from supra, this statute is an exercise of the state's police power to regulate intoxicants, and such an exercise is an outgrowth of the police power of the state.

V.

The State having the power to prohibit intoxicants by an exercise of its police power, it has the lesser power to appropriately regulate intoxicants in any manner which is to the general good of its citizenry.

Having shown that intoxicants do possess noxious qualities, and having shown by the authorities and cases quoted from supra, that a state does have the power to regulate intoxicants as to manufacture, sale, transportation, *use* and so on, a state undoubtedly has the right to regulate the consumption of intoxicants and the regulation here applies only to the consumption of intoxicants in places particularly conducive to the use of intoxicants.

From the rule established in Point IV above, and cases with which the Court is familiar, the principle is established that a state may impose any limitations, conditions, burdens, or responsibilities on those engaged in selling, manufacturing or using intoxicants. While no sale or manufacturing of intoxicants is concerned here, there is such a *use* of intoxicants as to bring the unregulated and uncontrolled consumption of intoxicants within the police power of the State.

There is no reason why the *use* of intoxicants should not be subject to regulations when the greater act is subject to regulation, that greater act being the sale and manufacture of intoxicants.

The state, in the exercise of its police power, has regulated various phases of the use of intoxicants. Different ex-

amples of a state's exercise of its police power in the regulation of intoxicants, are found in C. J. Vol. 33, Sec. 44 et. seq., page 514. Quoting, in part, from Section 44, we find the following:

> "* * * * so the legislature might prohibit such sales in places where, by reason of the character of the place itself or of the neighborhood, the traffic was likely to be unusually dangerous or detrimental to the morals or good order of the community."

Further, regulations as to the quantity sold have been sustained. Regulations prohibiting the sale to certain classes of people, minors, drunkards and intoxicated persons, have been sustained. Regulations by statute providing for the hours of closing and sale on particular days have been sustained. General traffic in liquors, that is, the general conduct of the liquor business, has been regulated to minimize the danger to the community or harm to individuals resulting from the use of intoxicants. Laws as to inspections, as to display of licenses, providing for screening of the bottled goods, refraining from using women and children as employees, the exclusion of women from particular rooms—all of these have been subject to state regulation and have been sustained as valid regulations on intoxicants under the police power of the state. See the citation of Corpus Juris, supra, for discussion of these regulations. Under the police power of a state, regulations have even been permitted of non-intoxicants. In C. J., Vol. 33, Sec. 65, page 519, the following is found:

> "* * * * It may regulate or prohibit the manufacture of, the traffic in, beverages not in fact intoxicating but which are of such a nature as to lend themselves to evasions of the law as to intoxicants."

The above cited and quoted from cases and authorities clearly show that a state can prohibit intoxicants altogether. It necessarily follows that a state can regulate intoxicants to any extent it chooses. The greater power, the power to prohibit entirely, includes the lesser power, the power to regulate, and here under Section 4895a, Laws of 1945, regulations of the consumption of intoxicants is only done as time and place.

The Ziffrin case, cited supra, expressly acknowledges that the power to prohibit contains the power to regulate. Therein it is stated at loc. cit. 167:

"The greater power includes the less. * * * *"

Further examples that other states have seen and recognized the evils attendant upon the operation of "set-up" establishments and have deemed it necessary to place a control upon that type of place, may be found in the laws of at least two other states. While the statutes of these other states are not word for word like the one under consideration, the obvious intent of the legislature of those states to control this unregulated and harmful-to-society consumption of intoxicants, is evident. The California Liquor Control Act, Section 53.2, allows the law enforcement officers of California to enjoin any place permitting the unregulated consumption of intoxicants. Again the legislature of the state of Indiana felt that the interest of society in Indiana would be best served by the outlawing of places primarily established and used for the unregulated consumption of intoxicants. The statutes of Indiana, Indiana Liquor Control Act, Section 12-439, is the one most nearly like the Missouri statute and applies to places where beverages and entertainment are provided and specifically names restaurants. We will not weary the Court with quoting the sections of the California

and Indiana Liquor Control Acts referred to here, but do commend them to the Court for the precedent they establish and the fact that they imply those states' recognition of the evils that flow from the unregulated consumption of intoxicants. It is, therefore, clear that Missouri does not stand alone in recognizing the evils that result and the danger to society that exists, when "set-up" establishments are permitted to operate without any regulations or control.

Therefore, as we have shown, a state has the power to regulate the use of intoxicants within its jurisdiction, and that it is a matter for state regulation, the *use* of intoxicants. We believe that we have shown that such regulation of the use of intoxicants can apply to the consumption of intoxicants as to places or premises and the time of consumption thereon; that a regulation of the nature here involved is an exercise of the police power of the state and should be considered as such; that a state having the power, under its policing authority, to prohibit intoxicants completely, the state has the lesser power to regulate the use of intoxicants in any manner conducive to the advancement or the safety of the community, the protection of its citizenry, or the general welfare of the public.

VI.

The present statute, Section 4895a, Laws of 1945, supra, is a reasonable regulation of intoxicants.

In the present instance the State of Missouri has undertaken to regulate by statute consumption of intoxicants upon a particular type of premises and to indicate the particular times when consumption of intoxicants may be permitted. As we all know, the particular type of place to which this law was intended to apply was the "set-up" establishment.

Under the guise of being a restaurant or place of entertainment, the ordinary patron could come into an atmosphere conducive to intemperance and consume upon the premises at any time and without restraint any intoxicant which he chose to bring into said place. While the liquor laws applying to the sale of intoxicants by-the-drink restrict the licensee of the intoxicating liquor by-the-drink establishments to particular hours in making sales and permitting consumption, the ordinary "set-up" place could operate at any time, any day, without restriction in any manner. Such places aided in nullifying the effect of the other statutes which prohibited sales at particular times in by-the-drink establishments by encouraging patrons to purchase their own intoxicants and bring them into the "set-up" places at those times which the state law had prohibited regularly licensed by-the-drink places from operating, Sec. 4891, Laws of Missouri, 1941.

The present statute is a valid exercise of the police power of this state as a regulation only to the hours or time at which the licensee may permit the drinking or consumption of intoxicants upon his premises. There can be no doubt that a state has the power to regulate the possession, *use*, transportation or manufacture, and a state legally can also regulate the premises where liquor is consumed, also a state can regulate as to the hours when it may be consumed, in the interests of it citizenry.

The regulation in this instance operates upon and follows the *use of the intoxicant*. If the patron wishes to attend the petitioners place of business and does not bring any liquor along, or care to drink, he is not required to do so, and suffers in no way from the regulation, but the patron who does come to petitioner's place of business, or any similar business

place, who does wish to drink intoxicants, does so subject to this state regulation, which limits the consumption of liquor to particular places, to particular times, and in such a manner as to be conducive to temperate drinking, ordinary conduct, and tends to improve, safeguard and keep the public morals. Only those persons who engage in a harmful exercise of their powers by consuming or drinking intoxicants come within this regulation. This is not such a right or fundamental privilege, the consumption of intoxicants, that anyone has the privilege of executing it the way he sees fit; Samuels v. McCurdy, cites supra. We have statutes and ordinances providing penalties for those persons who consume such a quantity of liquor as to become intoxicated and harmful or dangerous to themselves and others. In the state of Missouri we have prohibitory laws regarding people who drive cars in a drunken or intoxicated condition. We can regulate all of these things in the interest of the public, its safety and morals, and it is certainly a valid evercise of the police power to regulate or to make such regulations that tend to further the protection of the public, its safety and morals, and reduce intemperance.

Section 4895a, supra, is under no possible construction to be considered as directed at the restricting or regulating of the act of "providing food, beverages or entertainment for compensation." Any owner or proprietor of any establishment that "provides food, beverages or entertainment for compensation" may continue to do so in any manner he chooses. Only the permitting of the consumption of intoxicants within certain times is prohibited and regulated by the statute. If the owner permits the consumption of intoxicants, he must do so in accordance with the statute. If no consumption of intoxicants is permitted, there is no regulation of the

statute applicable to any other phase of the business. An examination of the statute here involved will conclusively disclose that this is the correct analysis, both as to the patron and the proprietor. The serving of food or beverages and the providing of entertainment may continue, subject only to the provider's discretion. There simply is no restraint or regulation imposed upon those activities. Again we say, only the consumption of intoxicants is regulated. Even operating under the license required by the law, the proprietor of such an establishment would have no other duty than to prohibit the drinking or consumption of intoxicants within the designated times.

This is a regulation only as to the actual drinking or consumption of intoxicants, as to time, and to a particular class of business. It applies to all alike in the same business. Any person who engages in the "set-up" business is subject to the same license and the same restrictions and regulations. All within the same class are treated alike; therefore, there is no discrimination. This regulation tends to restrain the consumption of liquor, either temperately or intemperately done, and thereby promotes the general welfare and the public good, and all licensees are charged alike with the duty to regulate consumption of intoxicants. In C. J., Vol. 33, Sec. 44, page 514, the right of a state, under its police power, to regulate premises, is found:

> "* * * * So the legislature might prohibit such sales in places where, by reason of the character of the place itself or of the neighborhood, the traffic was likely to be unusually dangerous or detrimental to the morals or good order of the community. * * * *"

Places that sell "set-ups" for use with intoxicants are conducive to intemperance, the very thing which the regula-

tory law on intoxicants attempts to minimize. In C. J., Vol. 33, Sec. 48, page 515, the method of conducting a business and the power to regulate same is found:

> "Persons licensed to sell intoxicants may be subjected to such supervision and control, in the conduct of their business, as will tend to preserve good order, prevent violations of the law, discourage intemperate drinking, and minimize the dangers to the community or the harm to individuals resulting from the traffic in liquors."

There is nothing in the statute which is discriminatory. Anyone who engages in the sale of "set-up" is regulated as to the time when intoxicants used with said setups may be consumed upon the premises, and in no other manner. That this regulation tends to promote the general welfare is found in the fact that it limits the time by establishing definite periods when intoxicants may or may not be consumed upon a particular premise, which acts as a deterrent in favor of public temperance. Furthermore, the statute subjects the licensed premises to inspection and supervision in the interests of the public morals, public temperance, and public order by bringing the licensee under the state laws and regulations of the liquor Supervisor of the State of Missouri. This will tend to promote the general public good, and minimize the evils which come from the use of intoxicants.

As we have pointed out supra, a state is allowed to regulate nonintoxicants in order to minimize drinking. C. J., Vol. 33, Sec. 65, page 519, reads as follows:

> "* * * * the legislature may regulate or prohibit the manufacture of, or traffic in, beverages not in fact intoxicating but which are of such a nature as to lend themselves to evasions of the law as to intoxicants. * * *"

The quotation from C. J., supra, is particularly apt wherein it states "beverages not in fact intoxicating but which are of such a nature as to lend themselves to evasions of the law as to intoxicants" may be regulated. This is the type of place, the "set-up" place, that lends itself to evasions or breaches of the law, not only the liquor law, but all laws relating to public order and conduct. That statement alone is authority for the enactment of the present statute by this state to regulate the use of particular types of beverages along with intoxicants.

The cases cited in the first point of this brief again and again point out that the states may enact laws aiding in the effectuation of the general regulatory law. That is what has been done under Sec. 4895a, supra. The general Liquor Control law regarding intoxicants is aided.

The present statute assists in bringing into conformity with the purpose of the state liquor control law all places where intoxicants are permitted to be consumed. It further brings these places into conformity with the purpose behind the regulations of those places that deal in the sale of intoxicants. That this statute is not a suppression of any right, but a mere restriction or restraint on the use of a subject possessing noxious qualities, and that it is a proper regulation of such, cannot be denied.

This is not the first time that Missouri in the exercise of her police power has undertaken to regulate the consumption of intoxicants as to the time and place, and such regulation was enacted in the behalf of good order and the public morals. In the statutes of 1919, Section 3495, R. S. Mo., 1919, we find a prohibition of the consumption of intoxicants at particular times and places, therein it is provided:

"Sec. 3495. Intoxicated persons on passenger trains—penalty.—It shall be unlawful for any person in this state to enter a passenger train or car, kept for the conveying of passengers, intoxicated, or drink intoxicating liquor on said passenger train or car, or to exhibit or carry exposed any intoxicating liquor on said passenger trains or cars, and every person or persons so doing shall be guilty of a misdemeanor, and fined not less than five dollars or more than twenty-five dollars for said offense. (R. S. 1909, 4710).

Note that the statute provides that it shall be unlawful for anyone to "drink intoxicating liquor on said passenger train or car." There the Legislature of Missouri undertook to determine that the *use* of intoxicants in that particular place was against the general public good and prohibited the doing of the same. Why should not the Legislature of Missouri in the exercise of the police power of the state regulate the consumption of intoxicants in "set-up" places? The Legislature of Missouri has the undoubted power to entirely prohibit the use of intoxicants in such places—is there any reason why the Legislature of Missouri may not enact such regulation as tend to minimize the harmful and dangerous effects of the consumption of liquor? Statistics will show a staggering increase in the crime wave, the death rate from car accidents and the resulting misery and pauperism that flows to the dependents or relatives of those injured or killed, all linked to the use of intoxicants. Minimizing these evils is in the interest of the public. That will be the effect of Sec. 4895a, supra.

The fact that the petitioner in this instance, we contend, misconceives the effect of the statute, Section 4895a, supra, is no reason that he should be granted the relief prayed for. Better it is that the respondent and other such operators

as "set-up" establishments should be instructed that the statute in this instance does not require the closing up of the establishment but merely regulates the consumption of the intoxicants upon the premises at particular hours. Petitioner would not be compelled to eject his patrons at any time. The petitioner can operate at any and all times in the "providing of food, beverages or entertainment for compensation." It is only in the "permitting of the drinking or consumption of intoxicants" that the statute imposes upon him the obligation to prohibit the consumption or drinking within certain times, those times being clearly set out by the statute. Again, let us reiterate, the statute is not directed at the "providing of food, beverages or entertainment for compensation," but only at the drinking or consumption of intoxicants within the prohibited times. That and that alone is the regulation contained in the statutes.

CONCLUSION.

We believe that we have shown that Section 4895a, Laws of 1945, supra, does regulate the consumption of intoxicants and not the business of providing "food, beverages or entertainment for compensation," therefore, we believe that it has been clearly and decisively demonstrated that the State of Missouri has the power to prohibit and/or regulate intoxicants. Approval of this power is found in both the federal and state decisions cited and quoted from under Point III, supra.

Secondly, we believe that we have shown that all regulations related to or directed at intoxicants grow out of the police powers of the state; that in the exercise of that power the state may enact any and all laws for the suppression of

the evils or the minimizing of the evils that grow out of the use of intoxicants.

Thirdly, we believe that the state, having the power to absolutely prohibit intoxicants, has the lesser power to appropriately regulate intoxicants in any manner or to any degree which is consistent with and in the aid of the public good, the public morals, and the protection of the state's citizenry.

And, finally, we believe that we have shown that this statute, Section 4895a, supra, is a reasonable regulation of intoxicants; that it is directed only at the consumption of intoxicants and at no other action. We believe that this is a subject upon which the police power of this state may be validly exercised and in the manner as it has been exercised.

PRAYER.

WHEREFORE, the Respondents submit that upon the reasoning and principles as mentioned it clearly appears that the Act of the 63rd General Assembly of Missouri herein questioned does not deprive this petitioner of his liberty and property without due process of law, and in no way violates Section 1 of the Fourteenth Amendment to the Constitution of the United States.

It consequently follows that the Supreme Court of Missouri was not in error in its ruling and the Respondents respectfully submit that this Honorable Court should refuse to issue a writ of certiorari to the Supreme Court of Missouri in this cause.

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